FILE COPY

Office-Supreme Court, U.S.
FILED
AUG 10 1959
JAMES R. BROWNING, Clerk

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No. 296

MAGNET COVE BARIUM CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al.*,
Appellees.

JURISDICTIONAL STATEMENT

GEORGE C. DARR, JR.,
P. O. Box 718,
Dallas 21, Texas.

LELAND D. SMITH,
6910 Fannin Street,
Houston 25, Texas.

SAM DAWKINS, JR.,
FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorneys for Appellant.

Dallas, Texas,
August 7, 1959.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

	Page
1. Opinion Below	1
2. Jurisdictional Grounds	2-4
(a) Nature of Proceeding	2-3
(b) Judgment and Order	3
(c) Statutory Provisions	3
(d) Cases Sustaining Jurisdiction	3-4
3. Questions Presented	4
4. Statement of the Case	4-6
5. Substantial Questions Involved	6-9
Proof of Service	9
Appendix A—Opinion Below	11-16

Table of Authorities Cited

	Page
Baltimore & O. RR Co. v. U. S., 298 U. S. 349	3
Interstate Commerce Commission v. Mechling, 330 U. S. 567	3
State of New York v. U. S., 331 U. S. 284	4
United States v. Abilene & Southern Ry. Co., 265 U. S. 274	7
United States v. Baltimore & O. RR Co., 333 U. S. 169	4
United States v. Hancock Truck Lines, Inc., 324 U. S. 774	4
United States v. L. A. Tucker Truck Lines, 344 U. S. 33	7
5 U. S. C. A. 1006-1010	2, 5, 6
28 U. S. C. A. 1253, 1336, 2101 (b), 2284, 2321-2325	2, 3, 6
49 U. S. C. A. 1 and 3	5

In the

Supreme Court of the United States

OCTOBER TERM, 1959

No.

MAGNET COVE BARIUM CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, and CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, et al.,
Appellees.

JURISDICTIONAL STATEMENT

In compliance with Rule 13 of the Supreme Court of the United States, the Magnet Cove Barium Corporation, Appellant herein, submits the following information in accordance with Rule 15:

1. OPINION BELOW

The opinion below is shown as Appendix "A" attached hereto and made a part hereof. It has not yet been reported in the Federal Supplement.

2. JURISDICTIONAL GROUNDS

(a) Nature of Proceeding

The judgment appealed from was entered by a three-judge statutory District Court of the United States at Houston, Texas, in a suit attacking the validity of a decision and order by District 2 of the Interstate Commerce Commission issued June 6, 1957, reported at 301 I. C. C. 13, wherein the Commission dismissed a complaint alleging that rates on numerous shipments of clay from Wyoming origins to Harvey, La., were unlawful.

A petition for reopening, reconsideration by the entire Commission and modification was denied. Later a petition for reopening and further hearing before a qualified examiner was denied. Suit was then filed in the District Court at Houston on April 19, 1958, as authorized in 5 U. S. C. A. 1009 and 28 U. S. C. A. 1336, 2321-2325. Appellant contended in the District Court that the Commission:

(a) Arbitrarily permitted the initial report to be prepared by an examiner who was not qualified as required by the Administrative Procedure Act (5 U. S. C. A. 1006-1010);

(b) Based its decision and order on excerpts from tariffs not in the record before the Commission and of which Complainant had no notice;

(c) Made vital findings of fact which were not supported by substantial evidence; and

(d) Arbitrarily disregarded uncontroverted evidence contrary to its ultimate findings and conclusions.

The District Court held that Appellant waived its right to a qualified examiner; that each finding of fact by the Commission found ample support in the evidence before the Commission; and it made no comment concerning the showing that the Commission based its conclusions on tariff items not in evidence and without notice to the parties that such items would be considered. It ordered the suit dismissed.

(b) Judgment and Order

The final judgment and decree by the District Court was entered April 16, 1959. Motion seeking a rehearing was filed April 25, 1959, and was submitted to the Court May 11, 1959. The motion was denied on May 11, 1959. Notice of Appeal was filed in the United States District Court for the Southern District of Texas, Houston Division, on June 13, 1959.

(c) Statutory Provisions

Jurisdiction of the Supreme Court of the United States to review by direct appeal the judgment and order of the three-judge statutory District Court entered in this case is conferred by *Sections 1253 and 2101(b), Title 28, U. S. Code, 62 Statutes 926 and 961, as amended, 28 U. S. C. A. 1253 and 2101(b).*

(d) Cases Sustaining Jurisdiction

Baltimore & O. RR Co., v. U. S., 298 U. S. 349 (1936);

Interstate Commerce Commission v. Mechling, 330 U. S. 567 (1947);

State of New York v. U. S., 331 U. S. 284 (1947);

United States v. Baltimore & O. RR Co., 333 U. S. 169 (1948);

United States v. Hancock Truck Lines, Inc., 324 U. S. 774 (1945).

3. QUESTIONS PRESENTED

This appeal presents the following questions:

1. Does the Interstate Commerce Commission have the power to make basic findings of fact not supported by substantial evidence of record and contrary to the evidence by all witnesses that testified in the proceeding?

2. Does the Interstate Commerce Commission have the power to base its findings and conclusions on documents not introduced in evidence and not referred to in the record?

3. Does the complainant waive its right to a hearing before a qualified examiner if it fails to request such hearing at the time it files exceptions to the proposed report?

4. STATEMENT OF THE CASE

This proceeding originated with the filing of a formal complaint with the Interstate Commerce Commission by the Magnet Cove Barium Corporation on October 31, 1955. The complaint alleged that the rates and charges assessed and collected on numerous carload shipments of common ground clay, in bags, from Greybull, Moorcroft and Upton, Wyoming, to Harvey, La., were unreasonable and unduly prejudicial to complainant (appellant here), in violation of

Sections 1 and 3 of the Interstate Commerce Act *(49 U. S. C. A. 1 and 3)*. Reparation on past shipments was sought.

The complaint was handled by the Commission under modified procedure, without oral hearings, and after the record was completed by verified statements it was referred to an examiner to prepare and serve a proposed report. He recommended various findings of fact and dismissal of the complaint, to which complainant filed nine exceptions. It later developed that this Examiner was not qualified as required by the Administrative Procedure Act *(5 U. S. C. A. 1006-1010)*. On June 6, 1957, Division 2 of the Commission handed down a decision (301 I. C. C. 13) dealing with two of those exceptions and overruling the remaining seven exceptions without comment. It ordered the complaint dismissed.

Division 2 of the Commission overruled seven of the nine exceptions without comment; it eliminated the finding referred to in Complainant's Exception No. 6; and it attempted to cure the defect in the finding referred to in Exception No. 2 by quoting and basing its conclusion on an excerpt from a freight tariff not cited in the record before the Commission. That tariff was not applicable on the shipments involved but Complainant had no notice that said tariff provision would be relied upon and it had no opportunity to show the Commission that it was not relevant to the issues before the Commission. Division 2 also made vital findings and conclusions which were not supported by substantial evidence. Some of them were contrary to uncontroverted evidence in the record.

The decision and order by Division 2 were issued June 6, 1957, and served on the parties June 19, 1957. On July 12, 1957, Complainant filed a petition for reopening, reconsideration by the entire Commission and modification. That petition was denied October 22, 1957. On December 2, 1957, Complainant filed a petition for reopening and further hearing before a qualified Examiner to present six additional facts. That petition was denied March 4, 1958. Suit was filed in the District Court April 19, 1958, in accordance with *Sections 1336, 2321-2325 and 2284 of Title 28, U. S. Code, 62 Statutes 931, 969, 970 and 968 (28 U. S. C. A. 1336, 2321-2325 nd 2284)* and *Section 1009 of Title 5, U. S. Code, 60 Statutes 243 (5 U. S. C. A. 1009)*.

The District Court handed down its decision April 8, 1959, and final judgment was rendered April 16, 1959. It made no comment concerning the Commission's use of tariff provisions not in evidence but it stated that each of the Commission's findings found ample support in the evidence. It held that, under the circumstances shown, Plaintiff waived its right to a trial before a qualified Examiner.

5. SUBSTANTIAL QUESTIONS PRESENTED

The questions presented here are substantial. In November, 1955, the Chicago, Burlington & Quincy Railroad Company originated 500 cars of clay destined to the Southwestern states. Apparently that movement approximates 6,000 cars per year. That is a substantial movement. But

of far greater importance is the effect the District Court decision will have on future litigation involving rates and charges on all shipments that are transported by railroad throughout the entire United States.

In *United States v. Abilene & Southern Railway Co., 265 U. S. 274*, this Court properly held that nothing could be treated as evidence by the Interstate Commerce Commission that is not introduced as evidence. Here, the Commission arbitrarily ignored that holding and based its conclusions on an excerpt from a freight tariff not introduced as evidence or referred to in the record before the Commission. The District Court, in dismissing the case without comment on that point, approved that practice.

There were only two witnesses in the case before the Commission, one testifying for Complainant, the other testifying for Defendants. Both witnesses testified that the applicable tariffs provided certain charges on the shipments involved in the complaint. Division 2 arbitrarily ignored the uncontroverted testimony of both witnesses and held that it could not find those charges were applicable under the existing tariffs. The District Court impliedly approved that practice.

In *United States v. L. A. Tucker Truck Lines, 344 U. S. 33*, this Court held that objection to an initial report by an unqualified examiner must be made to the administrative agency so that it would have an opportunity to correct the error. In this case a request for a new trial before a quali-

fied examiner was included in the petition for further hearing filed November 29, 1957. The Commission and the United States take the position that such request should have been made in complainant's exceptions to the proposed report. They say that an objection as to the examiner's qualifications is not timely made if it is not made before hearing is concluded and a final decision has been rendered. The District Court sustained their position and held that Appellant waived its right to a qualified examiner.

This case was handled under "modified procedure" by the Commission. In such cases there is no oral hearing. All testimony is submitted in affidavit form. None of the parties know who the Examiner will be until his proposed report is served. The parties have less than 30 days in which to file their exceptions in Washington, D. C. There is no official list of "qualified examiners." It can not easily be determined whether an examiner is qualified as required by the Administrative Procedure Act. It would be impossible to file objection before the hearing is concluded in modified procedure cases because no one knows at that time what examiner will be assigned to write the proposed report. It would be improper to require that an objection to the qualifications of the examiner be included in the exceptions prior to final decision. If the Commission corrects all errors excepted to, that would make it unnecessary to hold another hearing.

The District Court, in our opinion, misconstrued the Administrative Procedure Act in sustaining the position of the United States and the Commission. It is of substantial

importance to all litigants before administrative bodies to have that point cleared up.

Respectfully submitted,

GEORGE C. DARR, JR.,
P. O. Box 718,
Dallas 21, Texas.

LELAND D. SMITH,
6910 Fannin Street,
Houston 25, Texas.

SAM DAWKINS, JR.,

FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorneys for Appellant.

Dallas, Texas,
August 7, 1959.

PROOF OF SERVICE

I, Frank A. Leffingwell, one of the attorneys for the Magnet Cove Barum Corporation, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 7th day of August, 1959, I served copies of the foregoing Notice of Appeal to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States, by mailing copies thereof, in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., to Joseph V. Gallagher, same address, and to

William B. Butler, United States attorney, Post Office Building, Houston, Texas.

2. On the Interstate Commerce Commission, by mailing copies thereof, in a duly addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and to Francis A. Silver, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; The Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Railroad Company; Texas and New Orleans Railroad Company; and The Texas and Pacific Railway Company, intervening defendants, by mailing copies thereof in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

To Eldon Martin and James A. Gillen, Vice President and General Counsel and General Attorney and Commerce Counsel, respectively, Chicago, Burlington & Quincy Railroad Company, 547 West Jackson Blvd., Chicago 6, Ill.; and to Andrews, Kurth, Campbell & Bradley, their local attorneys, 22d Floor, Gulf Building, Houston 2, Texas.

FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorney for Magnet Cove Barium Corporation.

APPENDIX A

In the

United States District Court

FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

Civil Action No. 11,757

MAGNET COVE BARIUM CORPORATION, *Plaintiff,*

v.

UNITED STATES OF AMERICA, *Defendant.*

George C. Darr, Jr., of Dallas, Texas; Leland D. Smith, of Houston, Texas; and Sam Dawkins, Jr. and Frank A. Leffingwell, of Dallas, Texas, for the Plaintiff.

Victor R. Hansen, Assistant Attorney General, James E. Kilday and Joseph V. Gallagher, Attorneys, Department of Justice, Washington, D. C.; and William B. Butler, United States Attorney, Houston, Texas, for the Defendant United States of America.

Robert W. Ginnane, General Counsel, and Francis A. Silver, Associate General Counsel, Interstate Commerce Commission, Washington, D. C., for the Intervenor Interstate Commerce Commission.

Andrews, Kurth, Campbell & Bradley, of Houston, Texas; and Eldon Martin and James A. Gillen, of Chicago, Illinois, for the Intervening Railroads.

April 8, 1959.

Before BROWN, Circuit Judge, and CONNALLY and INGRAHAM, District Judges.

CONNALLY, District Judge:—

This action is one to enjoin and set aside a certain order of the Interstate Commerce Commission. It is filed pursuant to 28 U. S. C. A., 1336, 1398, 2284, and 2321-2325. It was heard by a three-judge district court, convened under §2284.

The plaintiff is Magnet Cove Barium Corporation, which ships by rail large quantities of ground clay, in bags, in carload lots from Greybull, Moorcroft and Upton, Wyoming, to Harvey, Louisiana. Defendant is the United States of America. The Interstate Commerce Commission, and the interested railroads, have intervened.

On October 31, 1955, this plaintiff filed a complaint with the Interstate Commerce Commission, alleging that the railroad rates upon such shipments of clay were unjust and unreasonable in amount, and were unduly prejudicial, in that rates to Buras, Louisiana, a station some 50 miles south of Harvey, and thus more distant from the point of origin, were less than those to Harvey. The Commission was requested to prescribe lawful rates, and to order reparation on certain designated earlier shipments.

The Commission directed that the complaint be handled under its "modified procedure," and pursuant thereto the parties filed their statement of fact, argument, etc. No oral hearing was held.

On June 14, 1956, Examiner L. B. Simpson, of the Commission's staff, to whom the matter had been assigned, filed

a proposed report. His findings were that the rates had not been shown to be unjust and unreasonable, nor unduly prejudicial to Buras. He recommended that the complaint be dismissed.

On July 16, 1956, plaintiff filed exceptions to the proposed report, which were answered in due course by the defendants. Division 2 of the Commission, under date of June 6, 1957, issued its report (301 I. C. C. 13) holding that the evidence offered by plaintiff failed to show that the questioned rates were unjust, unreasonable, or unduly prejudicial, and ordered the complaint dismissed.

On July 12, 1957, plaintiff filed "Petition for Reopening, Reconsideration and Modification." This was denied by the Commission, the order dated October 22, 1957.

On December 2, 1957, plaintiff filed yet another "Petition for Reopening and Further Hearing" which was denied by the Commission, order of March 4, 1958.

The proceeding in this Court was filed April 19, 1958.

It is unnecessary to dwell at length upon the contentions of the plaintiff with regard to the propriety of the questioned rates. Suffice it, for present purposes, to say that the question presented was one peculiarly within the area of the administrative body's expertise. Each finding found ample support in the evidence, and, in the judgment of this Court, should remain undisturbed.

One question requires comment. Examiner H. B. Simpson was not a "qualified" examiner under §11 of the Administrative Procedure Act (Title 5, U. S. C. A., §§1006-1010). Defendants and intervenors do not deny that the

matter was one calling for consideration by a "qualified" examiner *(Riss & Co. v. U. S., 341 U. S. 907; Reliance Steel Products Co. v. U. S., 150 F. Supp. 118)*. It is equally clear that the objection to consideration by an unqualified examiner should be raised as soon as possible after the facts become known (or, with diligence, should be known), and that failure to raise the question in timely fashion constitutes a waiver thereof *(U. S. v. Tucker Truck Lines, Inc., 344 U. S. 33)*. We hold that the plaintiff here waived the question.

Under the Commission's "modified procedure," no oral hearing was held before the examiner, and plaintiff contends—and rightly so—that it was unaware of the identity of the examiner to whom the matter was assigned until the proposed report was filed June 14, 1956. Plaintiff contends further that it did not learn that Mr. Simpson in fact was not "qualified" under the statute until long thereafter. Plaintiff has made no showing of record as to when it first acquired this information In the course of the oral argument here, in answer to questions from the Court, counsel stated that it was very shortly after July 2, 1957, when he contacted the Chief Examiner of the Commission, who gave him this information.

On July 12, 1957, the Petition for Reopening, Reconsideration and Modification before the entire Commission was filed. This petition made no reference to the question of the unqualified examiner. In the further Petition to Reopen, filed December 2, 1957, the question was presented to

the Commission for the first time, and the only time, and only to the extent herein noted.

It should be borne in mind that the report of Division 2 of June 6, 1957, and the order of October 22, 1957, by the full Commission, denying the first Petition to Reopen, had held that the plaintiff had not offered sufficient evidence to sustain its contentions. The import of the second Petition for Reopening (of December 16, 1957) was that new evidence was necessary, and that the matter should be reopened, to that end. The only reference there to the question of the initial submission to an unqualified examiner (if such language may be so characterized) is the following statement, contained under the heading "2. *New Evidence Necessary.*":

> "* * * We, therefore, request that the cause be reopened and assigned for further hearing before a qualified examiner to permit us to submit additional evidence concerning the following facts * * *."

and again in the prayer:

> "Wherefore, we respectfully request that the case be reopened for further hearing before a qualified examiner to enable the parties to cure the deficiencies pointed out by Division 2."

Such language may not be construed as presenting, fairly and clearly to the Commission, the point that plaintiff was complaining that an examiner, whose appointment did not comply with the statute, had considered the matter in the first instance. The reference to the unqualified examiner is casual and ambiguous at best, and readily might be construed simply as a criticism of the examiner who made the findings adverse to plaintiff. Apparently the Commission did not construe the language as raising the point of

law now before us, for no mention was made of the unqualified examiner question in the order of March 4, 1958.

Thus, plaintiff made no inquiry for more than 12 months; failed to raise the point in its motion to reopen of July 12, 1957; and gave the question most trite and superficial treatment in its motion of December 16, 1957.

The question has been presented to this Court with much force and emphasis. When this is compared with the treatment it received before the Commission, the result is inescapable that it was raised there not in order to secure relief while the matter was before the Administrative body, but with an eye to review by the District Court.

Of the view, as we are, that the order of the Interstate Commerce Commission was supported by ample evidence, and that the error in submitting the matter to the unqualified examiner was waived by plaintiff, it follows that plaintiff is not entitled to the relief sought, and that the action should be dismissed.

Clerk will notify counsel.

Done at Houston, Texas, this 8th day of April, 1959.

/s/ John R. Brown
Judge, United States Court of Appeals

/s/ Ben C. Connally
United States District Judge

/s/ Joe Ingraham
United States District Judge

NOTE: Findings of fact and conclusions of law were not filed.

FILE COPY

FILED
SEP 4 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 296

MAGNET COVE BARIUM CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

MOTION TO AFFIRM.

JAMES A. GILLEN,
ELDON MARTIN,
547 West Jackson Boulevard,
Chicago 6, Illinois,
Attorneys for Railroad Appellees.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

	PAGE
Motion	1
Point I	2
Point II	3
Conclusion	3
Proof of Service	4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 296.

MAGNET COVE BARIUM CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS, HOUSTON DIVISION.

MOTION TO AFFIRM.

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, appellee railroads[1] move the Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on which the decision

1. Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; The Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Railroad Company; Texas and New Orleans Railroad Company; The Texas and Pacific Railway Company.

of the cause depends are so unsubstantial as not to need further argument.

In support of their motion these appellees respectfully show:

I.

Beginning on page 6 of its Jurisdictional Statement under the heading "5. Substantial Questions Presented", appellant implies that the Interstate Commerce Commission based its ultimate conclusion on an excerpt from a freight rate tariff not physically introduced in evidence. However, the ultimate conclusion of the Commission was that appellant had failed to sustain its burden of proving that the rates assailed were unlawful.

This proceeding was initiated before the Commission by the filing of a complaint by appellant attacking the lawfulness of the through rates on clay from origins in the State of Wyoming to Harvey, Louisiana. By reason of filing said complaint, appellant assumed unto itself the burden of proving the allegations contained therein. Upon consideration of all the evidence, the Commission concluded that appellant had not shown the assailed rates to be unlawful and dismissed the complaint. The rates in issue in the Commission proceeding were the through rates which had been assessed on appellant's shipments, but in the verified statements of the witnesses for both appellant and these appellees reference was made to other rates in other tariffs which might be used as combination rates producing a slightly lower charge. The tariffs themselves were not physically introduced in the record. It is the Commission's discussion of these tariffs to which appellant now takes exception. It was perfectly proper for the Commission to discuss these tariffs since the parties had already referred to them. Furthermore, all the Commission said with re-

spect to these tariffs was that it could not find them to be applicable on appellant's shipments because there was no showing that they applied on the same commodity.

To the extent that there was any deficiency in the record which prevented the Commission from finding that these tariffs were applicable, such deficiency was the result of appellant's failure to present adequate proof. But, in any event the Commission's discussion of these tariffs was not the only basis for its conclusion that appellant had not proved its case.

II.

It is anticipated that the other appellees, United States of America and the Interstate Commerce Commission, will discuss the question of the status of the examiner who filed the initial report in the proceeding before the Commission, but these appellees respectfully urge that the District Court was correct in its conclusion that appellant's action, or lack of it, constituted a waiver of that question.

Conclusion.

There was substantial evidence in the record to support the Commission's judgment in this case. Under such circumstances there is no substantial question presented for consideration by this Court and these appellees respectfully request that the decision of the lower court be affirmed.

Respectfully submitted,

JAMES A. GILLEN,
ELDON MARTIN,
547 West Jackson Boulevard,
Chicago 6, Illinois,
Attorneys for Railroad Appellees.

September, 1959.

PROOF OF SERVICE.

I, Eldon Martin, one of the attorneys for the Railroad Appellees, and a member of the bar of the Supreme Court of the United States, hereby certify that on the 2nd day of September, 1959, I served copies of the foregoing Motion to Affirm on the several parties hereto, as follows:

1. On Magnet Cove Barium Corporation, appellant, by mailing copies thereof in duly addressed envelopes, with air mail postage prepaid, to its attorneys of record as follows:

To George C. Darr, Jr., P. O. Box 718, Dallas 21, Texas; Leland D. Smith, 6910 Fannin Street, Houston 25, Texas; Sam Dawkins, Jr., and Frank A. Leffingwell, both at 1515 Praetorian Building, Dallas 1, Texas.

2. On the United States of America, by mailing copies thereof, in a duly addressed envelope, with air mail postage prepaid, to the Solicitor General, Department of Justice, Washington 25, D. C., to Joseph V. Gallagher, same address, and to William B. Butler, United States Attorney, Post Office Building, Houston, Texas.

3. On the Interstate Commerce Commission, by mailing copies thereof, in a duly addressed envelope, with air mail postage prepaid to Robert W. Ginnane, General Counsel, and to Francis A. Silver, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

ELDON MARTIN,
547 West Jackson Boulevard,
Chicago 6, Illinois,
Attorney for Railroad Appellees.

E COPY

Office-Supreme Court, U.S.
FILED
SEP 9 1959
JAMES R. BROWNING, Clerk

No. 296

In the Supreme Court of the United States

OCTOBER TERM, 1959

MAGNET COVE BARIUM CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

J. LEE RANKIN,
Solicitor General,
ROBERT A. BICKS,
Acting Assistant Attorney General,
RICHARD A. SOLOMON,
Attorney,
Department of Justice, Washington 25, D.C.

ROBERT W. GIMBANE,
General Counsel,
FRANCIS A. SILVER,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D.C.

INDEX

	Page
Statement	1
Argument	4
Conclusion	8

CITATIONS

Cases:	
Crancer v. *Lowden*, 315 U.S. 631	7
Interstate Commerce Commission v. *Union Pacific R. Co.*, 222 U.S. 541	6
Louisville & Nashville R.R. v. *Maxwell*, 237 U.S. 94	7
Mississippi Valley Barge Line Co. v. *United States*, 292 U.S. 282	6
Rochester Telephone Corp. v. *United States*, 307 U.S. 125	6
United States v. *Pierce Auto Freight Lines*, 327 U.S. 515	6
United States v. *Tucker Truck Lines, Inc.*, 344 U.S. 33	4, 5
Universal Camera Corp. v. *National Labor Relations Board*, 340 U.S. 474	6
Statutes:	
Administrative Procedure Act, 60 Stat. 237, 5 U.S.C. 1001, *et seq.*, Sec. 11	2, 4
Miscellaneous:	
Interstate Commerce Commission General Rules of Practice Nos. 44 through 54, 49 U.S.C. Appendix	2

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 296

MAGNET COVE BARIUM CORPORATION, APPELLANT

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(*e*) of the Revised Rules of this Court, the United States and the Interstate Commerce Commission, appellees, move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment dated April 16, 1959, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing the appellant's complaint seeking to set aside an order of the Interstate Commerce Commission.

By complaint filed with the Commission on October 31, 1955, the appellant alleged that rates charged on a specified number of carloads of ground clay, in bags,

moving from Greybull, Moorcroft and Upton, Wyoming, to Harvey, Louisiana, during a stated period, were unjust, unreasonable and unduly prejudicial to the appellant and Harvey, and unduly preferential to Buras, La. The Commission was asked to prescribe lawful rates for the future and award reparation on certain past shipments. The Chicago, Burlington & Quincy Railroad Company and thirteen other railroads were named as defendants. The case was heard under the modified procedure rules of the Commission (General Rules of Practice Nos. 44 through 54; 49 U.S.C. Appendix). There was no oral hearing on any phase of the case. On June 14, 1956, a proposed report was filed by a Commission examiner, who was not a qualified hearing examiner within the meaning of Section 11 of the Administrative Procedure Act (5 U.S.C. 1010). The examiner found that the assailed rates had not been shown to be unjust and unreasonable; that undue preference or prejudice had not been established, and that the evidence did not support the appellant's allegation that it had suffered damages on the basis of the rates found to be just and reasonable. He recommended that the complaint be dismissed. The appellant filed exceptions to the proposed report on July 16, 1956. On June 6, 1957, the Commission (Division 2) issued its report in which it found that the rates assailed had not been shown to have been or to be unjust, unreasonable, or unduly prejudicial, and ordered the complaint dismissed (301 I.C.C. 13).

In its report the Commission pointed out that the appellant's case depended upon its description of the

product shipped as "common ground clay." The Commission concluded, however, that the appellant's shipments in fact consisted of "Wyoming bentonite clay," a more valuable product, used by the petroleum industry in rotary drilling and as an agent for filtering and decolorizing oils, which takes a different, higher classification for rate purposes than ordinary common clay.

The Commission also analyzed the evidence submitted to show the alleged discrimination in rates between shipments from the Wyoming locations to Harvey and Buras. It found (301 I.C.C. at 20) that no showing had been made that the complainant had been subjected to any disadvantage in the marketing of its product as a result of the lower rate to Buras, to which no shipments of Wyoming bentonite clay had moved in 1955 and only two in 1952, 1953 and 1954 (*id.*, at 16). It also found that the aggregate rates to Harvey, Louisiana, upon which the appellant predicated its case, were not in fact applicable to the commodity shipped (*id.*, 16–18).

Subsequently, on July 12, 1957, the appellant filed a Petition for Reopening, Reconsideration and Modification. By order of the entire Commission, dated October 22, 1957, the petition was denied. Thereafter, on December 2, 1957, the appellant filed a second Petition for Reopening and Further Hearing. The petition was denied by the entire Commission on March 4, 1958.

The three-judge district court unanimously sustained the Commission. (See Juris. St., Appendix A, pp. 11–16.) The court concluded that the question

presented with respect to the questioned rates was one peculiarly within the area of the administrative body's expertise, and that each finding found ample support in the evidence. The court also concluded that the appellant, by its conduct, waived any objection it might have raised to the qualification of the Commission's examiner under Section 11 of the Administrative Procedure Act (5 U.S.C. 1010).

ARGUMENT

1. The appellant's right to object to reference to an examiner not "qualified" under Section 11 of the Administrative Procedure Act (5 U.S.C. 1010) was waived by its failure to make timely objection. As the district court ruled (Juris. St. p. 14) it was "clear that the objection to consideration by an unqualified examiner should be raised as soon as possible after the facts become known (or, with diligence, should be known), and that failure to raise the question in timely fashion constitutes a waiver thereof (*United States* v. *Tucker Truck Lines, Inc.*, 334 U.S. 33). We hold that the plaintiff here waived the question."

The record before the lower court revealed that before the appellant, on July 12, 1957, filed its first petition for rehearing by the Commission, it had been fully advised by letter from the Association of Interstate Commerce Commission Practitioners, Washington, D.C., dated July 2, 1957, that Examiner H. B. Simpson, who filed a proposed report in the matter on June 14, 1956, was not a qualified examiner within the terms of Section 11 of the Administrative Procedure Act, *supra*. (Motion for New Trial, section 3, pp. 5–10). Notwithstanding this knowledge the appellant

did not raise any question concerning the qualification of Examiner Simpson. In its original brief in the court below (Plaintiff's Original Brief, dated November 7, 1958) it is stated (pp. 6–7):

> After Division 2 had issued its final decision, it was still possible for the entire Commission on appeal to cure the defects in that decision if Complainant's petition for reopening and modification * * * had been granted. Complainant did not ask for further hearing before a qualified examiner until other possible remedies had been exhausted.

The appellant, by its own admission, thus deliberately adopted a "lying-in-wait" posture on this issue—an indefensible position wholly at odds with the ruling of this Court in *United States* v. *Tucker Truck Lines*, *supra*, where it was said (344 U.S. at 37):

> Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objections made at the time appropriate under its practice.

Moreover, as suggested by the lower court (Juris. St. p. 15), the document in which appellant claims to have raised the question (Second Petition for Reopening and Further Hearing, filed December 2, 1957) at best uses "casual and ambiguous" language in its reference to a further hearing before a "qualified examiner" which "may not be construed as presenting, fairly and clearly to the Commission, the point that plaintiff was complaining that an examiner,

whose appointment did not comply with the statute, had considered the matter in the first instance." Under the circumstances in the instant case, the district court clearly did not err in holding that the error in submitting the matter to the examiner, who lacked statutory qualifications, was waived by the appellant.

2. The appellant's arguments on the merits of the Commission's order are directed to the validity of its analysis of the record evidence in resolving the dispute between the parties as to the nature of the particular commodity shipped and in determining the applicability to such shipments of the tariffs asserted to be controlling. The Commission's determinations of these matters are exactly the type of informed judgments of an expert body which the courts are properly reluctant to upset if they are based upon substantial evidence and reflect a reasoned analysis of the conflicting claims. See *Interstate Commerce Commission* v. *Union Pacific R. Co.*, 222 U.S. 541, 547–8; *Mississippi Valley Barge Line Co.* v. *United States*, 292 U.S. 282, 286–7; *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 139; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535; *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 488. Where, as here, a three-judge district court, after full briefing and oral argument, has concluded, in a case of no great general interest, that "[e]ach finding" of the Commission has "ample support in the evidence" and no reason exists for disturbing the Commission's judgment as to the "propriety of the questioned rates" (Juris. St. p. 13), no need

for further review of such questions by this Court exists.

The appellant contends that the Commission erred in rejecting the agreement among the parties as to the applicability of certain tariff provisions to the shipments in controversy and in basing these conclusions in part upon a published tariff not introduced in evidence or cited by any party in the hearing record. But the Commission clearly was not bound to accept the opinion of the parties as to the proper construction and application of tariff provisions, merely because they were in agreement thereon. On the contrary, it has been uniformly held that an effective tariff on file with the Commission binds both carrier and shipper regardless of their agreement—intentionally or accidentally—upon a mistaken view as the proper rate intended for a particular shipment or carriage. See *Crancer* v. *Lowden*, 315 U.S. 631, 635; *Louisville & Nashville R.R.* v. *Maxwell*, 237 U.S. 94, 97. Similarly the Commission, in performing its assigned task of evaluating the significance of the evidence adduced, was acting fully within its authority in citing a published tariff provision on file with the Commission which illuminated the inadequacy of the proof adduced by the complainant, despite the failure of either party to the hearing to refer to it. In both cases appellant was fully protected against any substantive error on the part of the Commission division in its independent evaluation or its reference to the previously uncited tariff, by its right to appeal to the full Commission and to seek review in the district court.

CONCLUSION

We submit that the decision below is clearly correct and that this case presents no substantial question. The judgment of the district court should be affirmed.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

ROBERT A. BICKS,
Acting Assistant Attorney General.

RICHARD A. SOLOMON,
Attorney.

ROBERT W. GINNANE,
General Counsel,

FRANCIS A. SILVER,
Associate General Counsel,
Interstate Commerce Commission.

SEPTEMBER 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959

FILE COPY

Supreme Court, U.S.
FILED
SEP 21 1959
JAMES R. BROWNING, Clerk

No. 296

In the

Supreme Court of the United States

OCTOBER TERM, 1959

MAGNET COVE BARIUM CORPORATION,
Appellant,

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al.*,
Appellees.

On Appeal from the United States District Court for the Southern District of Texas.

APPELLANT'S REPLY TO MOTIONS TO AFFIRM

GEORGE C. DARR, JR.
P. O. Box 718,
Dallas 21, Texas.
LELAND D. SMITH,
6910 Fannin Street,
Houston 25, Texas.
SAM DAWKINS, JR.,
FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorneys for Appellant.

Dallas, Texas,
September 18, 1959.

WARLICK LAW, INC.—1207 HORD STREET—DALLAS—RI 1-6711

INDEX

	Page
1. Motion by Railroads	1
2. Motion by the United States	4
(a) Unqualified Examiner	4
(b) Lack of Substantial Evidence	6
3. Conclusion	7
Proof of Service	9

Authorities Cited

Administrative Procedure Act, 5 U. S. C. A. 1001-1011	2, 7
Interstate Commerce Act, 49 U. S. C. A. 4	3
United States v. Abilene & Southern Ry., 265 U. S. 274	2
United States v. Tucker Truck Lines, Inc., 344 U. S. 33	4

No. 296

In the

Supreme Court of the United States

OCTOBER TERM, 1959

MAGNET COVE BARIUM CORPORATION, *Appellant,*

v.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, AND CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY, *et al.*, *Appellees.*

On Appeal from the United States District Court for the Southern District of Texas.

APPELLANT'S REPLY TO MOTIONS TO AFFIRM

The Magnet Cove Barium Corporation, Appellant herein, files the following reply to motions to affirm filed by appellee railroads, the United States and the Interstate Commerce Commission.

1. MOTION BY RAILROADS

Appellee railroads state:

> "It was perfectly proper for the Commission to discuss these tariffs (containing rate provisions mentioned by witnesses) since the parties had already referred to them." Section I, page 2.

That statement ignores the fact that both witnesses testified that Item 1120 covered the clay shipped by complainant. The Commission disregarded that uncontroverted testimony and based its conclusions on Item 5742, cited on page 17 of the decision, which was not mentioned in the record.

Item 5742, cited by the Commission (Plaintiff's Exhibit 8), does not apply on the commodity involved in the complaint, it was not referred to in the record at any time and the Commission should not have considered it. Such consideration is prohibited by the Interstate Commerce Act as construed by this Court in *United States v. Abilene & Southern Railway Co., 265 U. S. 274*, and by Section 7(d), *Administrative Procedure Act (5 U. S. C. A. 1006)*. Appellant had no notice that this item would be considered and it had no opportunity to explain to the Commission that it was irrelevant to the issues here involved.

There were only two witnesses in this case. Both of them testified that the single-factor rate which the railroads had been assessing and collecting exceeded the combination over the intermediate point of Ama, La., by $1.00 per ton. Both witnesses used Item 1120 (cited at the top of Page 17 of the decision) to and from Ama, La., and *Witness Larsen* stated that the Appellees would refund down to the Ama combination rate. See verified statements of *Witness Glover* (Plaintiff's Exhibit 3 and 5) and *Witness Larsen* (Plaintiff's Exhibit 4). No refunds have been made and the Appellee railroads decline to make them because of the Commission's erroneous finding. See page 49 of the oral argument before the trial court.

Judge Brown, who presided at the argument, asked whether any one mentioned Item 5742 before the Commission but Counsel for the Commission gave a lengthy reply without answering that question (Pages 31-32 of argument). The fact is that some one in the Commission's office found that item and used it as a basis for a finding contrary to the testimony of both witnesses. If the Ama combination rates applied on the clay involved in the Complaint, the Commission would have to hold that the rates charged were illegal to the extent that they exceeded the combination.

Furthermore, the rates assessed and collected at Harvey, La., would have been illegal because the record shows that they exceed the rates to Burus, La., a more distant point over the same route, and no Fourth Section relief has been granted by the Commission. The Examiner had held that the rates to Harvey had not been shown to be unlawful and Item 5742 was used in an effort to sustain the unqualified examiner's conclusion.

We agree that plaintiff had the burden of proving its allegations before the Commission. But there was no deficiency in the record. The testimony by both witnesses clearly shows that the rates under attack exceeded the aggregate of intermediate rates and violated the long-and-short-haul clause of Section 4 of the Interstate Commerce Act. (*49 U. S. C. A. 4.*) If the Commission had based its decision on the uncontroverted evidence of record, it would have been compelled to find that the rates assessed and

collected at Harvey were unlawful to the extent that they exceed the Ama, La., combination and the rate contemporaneously applicable to Buras, La., via Harvey. Item 5472 did not apply on plaintiff's shipments, it had no relevancy to the issues involved and was not mentioned in the record.

2. MOTION BY THE UNITED STATES

(a) Unqualified Examiner

We understand the position of the United States to be that a complainant must object to consideration of a record by an unqualified examiner just as soon as the facts become known (or, with diligence, should be known). In *United States v. Tucker Truck Line, Inc., 344 U. S. 33*, this court held that objections to the examiner must be made while the administrative agency has an opportunity to correct the error, but it would not be proper to require the parties to seek a new hearing before a qualified examiner if, by other means, the administrative agency corrects the errors committed by such examiner.

To illustrate, the Examiner in this case made several errors in his proposed report as to which complainant filed nine (9) exceptions. If the Division had revised the proposed report as requested in connection with those exceptions, the injury to complainant caused by the assignment of an unqualified examiner would have been removed. It would have been an unnecessary waste of time and money

to assign the case for further hearing before a qualified examiner.

However, seven (7) of those exceptions were overruled and Division 2 went outside the record and relied on Item 5742 to support the proposed report. That item was first injected into the case by the decision of Division 2. We then filed the petition for reopening and reconsideration by the entire Commission shown in this record as Plaintiff's Exhibit 10. If the errors cited in that petition had been corrected by the entire Commission, it would have been unnecessary to have a further hearing before a qualified examiner, but that petition was denied (Plaintiff's Exhibit 11). This was not a "lying-in-wait" posture as contended by the United States. It was an effort to have the administrative agency cure the errors cited without the necessity of a further hearing.

We then filed a petition for reopening and further hearing before a qualified examiner (Plaintiff's Exhibit 12). We did not specifically argue the request for a qualified examiner because the Commission had decided three months prior to the filing of that petition that it would not grant further hearings on the ground of an unqualified examiner unless objection had been made prior to the final decision (Plaintiff's Exhibit 14.) The final decision in this case was rendered June 6, 1957 (Plaintiff's Exhibit 8).

The Appellant did not waive its right to a hearing before a qualified examiner but it did delay its request therefor

until all other methods of correcting errors by the former examiner had failed. It did make timely application for a further hearing before a qualified examiner (Plaintiff's Exhibit 12) and this petition was denied before suit in the district court was filed. In view of the position of the Commission expressed in Plaintiff's Exhibit 14, we knew the Commission would not grant a further hearing solely on the ground that an unqualified examiner had written the proposed report. No purpose would have been served by extensive argument on that point.

(6) Lack of Substantial Evidence

Counsel for the United States (Page 7) contends that the Commission was not bound to accept the opinion of the parties as to the applicable rates. But this was not opinion evidence. Both parties made uncontroverted statements of fact, giving complete tariff reference to the rates quoted by each of them. Those rates apply on the commodity described in Item 1120, quoted at the top of Page 17 of the Commission's decision (Plaintiff's Exhibit 8). If Division 2 of the Commission had considered only the applicable tariffs cited in the exhibits filed by *Witnesses Larsen* and *Glover*, it would have found that the rates under attack were unlawful.

Counsel erred in stating that Appellant is protected against any substantive error by the Commission division in its evaluation of uncited tariff items. None of the parties

had any notice that Item 5742 would be considered and there was no opportunity to show the Commission that this item does not apply on the commodity involved in the complaint. The appeal to the entire Commission was denied and the district court held that each finding of the Commission had "ample support in the evidence."

On page 6 of argument, Counsel for the United States stated that this case is of no "great general interest." Counsel for Railroad Appellees contended that the questions on which the decision depends are "so unsubstantial as not to need further argument." These questions are directly involved in every formal complaint before the Interstate Commerce Commission and most other administrative agencies. If these agencies are permitted to ignore substantial evidence and make basic findings of fact on documents not mentioned in the record, of which the parties have no notice, administrative procedure will produce results contrary to that contemplated in the *Administrative Procedure Act, 5 U. S. C. A. 1001-1011.*

The finding of Division 2 is not supported by substantial evidence and is directly contrary to the uncontroverted evidence in the record.

3. CONCLUSION

The trial court erred in holding that the Commission may lawfully base material findings of fact on tariff items not in evidence, that such basic findings need not be supported

by substantial evidence, and that Appellant waived its objection to the unqualified examiner because that point was not raised prior to the final decision by the Commission. We respectfully ask that motions to affirm be denied.

Respectfully submitted,

GEORGE C. DARR, JR.
P. O. Box 718,
Dallas 21, Texas.

LELAND D. SMITH,
6910 Fannin Street,
Houston 25, Texas.

SAM DAWKINS, JR.,

FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorneys for Appellant.

Dallas, Texas,
September 18, 1959.

PROOF OF SERVICE

I, Frank A. Leffingwell, one of the attorneys for the Magnet Cove Barium Corporation, appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 18th day of September, 1959, I served copies of the foregoing Reply on the several parties thereto, as follows:

1. On the United States, by mailing three copies thereof, in a duly addressed envelope, with air mail postage prepaid, to J. Lee Rankin, Solicitor General, Department of Justice, Washington 25, D. C.

2. On the Interstate Commerce Commission, by mailing copies thereof, in a duly addressed envelope, with air mail postage prepaid, to Robert W. Ginnane, General Counsel, and to Francis A. Silver, Associate General Counsel, at the offices of the Commission, Washington 25, D. C.

3. On the Chicago, Burlington & Quincy Railroad Company; Chicago, Rock Island and Pacific Railroad Company; The Colorado and Southern Railway Company; Fort Worth and Denver Railway Company; The Kansas City Southern Railway Company; Missouri-Kansas-Texas Railroad Company; Missouri-Kansas-Texas Railroad Company of Texas; Missouri Pacific Railroad Company; Texas and New Orleans Railroad Company; and The Texas and Pacific Railway Company, intervening defendants, by mailing

copies thereof in duly addressed envelopes, with first class postage prepaid, to their attorneys of record, as follows:

To Eldon Martin and James A. Gillen, Vice President and General Counsel and General Attorney and Commerce Counsel, respectively, Chicago, Burlington & Quincy Railroad Company, 547 West Jackson Blvd., Chicago 6, Ill.; and to Andrews, Kurth, Campbell & Bradley, their local attorneys, 22d Floor, Gulf Building, Houston 2, Texas.

FRANK A. LEFFINGWELL,
1515 Praetorian Building,
Dallas 1, Texas,
Attorney for Magnet Cove Barium Corporation.